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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re D.B., a Person Coming Under the
Juvenile Court Law.

—

THE PEOPLE,

Plaintiff and Respondent,

v.

D.B.,

Defendant and Appellant.

B197124

(Super. Ct. No. TJ13413)

ORDER MODIFYING OPINION,
AND DENYING PETITION FOR
REHEARING

[No change in judgment]

THE COURT:

It is ordered that the opinion filed herein on November 17, 2008, be modified in the following particular:

1. On page 11, delete the heading beginning “**B. Substantial evidence**” and insert the following in its place:

B. Substantial evidence does not support the gang enhancement under sections 186.22 and 190.2.

2. On Page 13, in the first full paragraph, delete the last sentence beginning “His failure to testify” and insert the following in its place:

His failure to testify that these felonies constituted the gang’s “primary activities” is fatal to the gang enhancement under section 186.22.

3. At the end of the aforementioned sentence on page 13, now modified to read “His failure to testify that these felonies constituted the gang’s ‘primary activities’ is fatal to the gang enhancement under section 186.22,” add footnote number 8, which shall read:

Section 190.2, subdivision (a)(22), provides that the “penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if [t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.” Because section 186.22 defines a “criminal street gang” as a gang that engages in certain statutorily enumerated felonies as its “primary activities,” and because we have concluded the prosecution presented insufficient evidence of the Bloods’ “primary activities,” we also conclude that there is insufficient evidence to support the section 190.2 enhancement.

4. On page 13, following the last full paragraph that ends with “the allegation must be dismissed,” insert the following new paragraph:

The information alleged: criminal street gang murder (count one) and murder (count two). D.B. contends, and the Attorney General agrees, that we should dismiss count two. Accordingly, we strike count two from the sustained petition.

5. On page 17, delete the first full sentence beginning “The finding under section 186.22” and insert the following in its place:

Count two is dismissed. The finding under sections 186.22 and 190.2 that D.B. committed murder to benefit and further the activities of a criminal street gang is reversed and the matter is remanded to the juvenile court with directions to dismiss the finding and, accordingly, recalculate the minor’s maximum period of confinement based on first degree murder.

6. Renumber the footnotes and pages throughout the remainder of the opinion accordingly.

D.B.'s petition for rehearing is denied.

_MALLANO, P.J.

ROTHSCHILD, J.